90-1978

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

CARRIE ANGELA LATTARULO,

Petitioner,

versus

THE STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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June 24, 1991

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner was denied due process where the result of a test of the petitioner's breath was admitted under the provisions of O.C.G.A. § 40-6-392 without regard to the test's scientific reliability and it was not shown the test was conducted in a scientifically reliable manner such as to obtain verifiably certain results?

2. Whether petitioner was denied due process where the trial court charged the jury they must apply a standard blood to breath alcohol ratio while the undisputed evidence showed petitioner's personal ratio was less than the standard and this would cause an overstatement of her alcohol reading by the state's breathalyzer machine?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to this proceeding.

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CARRIE ANGELA LATTARULO,

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versus

THE STATE OF GEORGIA,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

Petitioner Carrie Angela Lattarulo prays that the Writ of Certiorari issue to the Georgia Supreme Court to review the decision of the Georgia Supreme Court entered March 27, 1991.

OPINIONS BELOW

Reproduced in the appendix to this petition are (1) the decision of the Georgia Supreme Court dated February 28, 1991, (2) the March 27, 1991, order of the court denying petitioner's Motion for Reconsideration, and (3) the April 15, 1991, order of the court granting petitioner's Motion for Stay of Remittitur. The Georgia Supreme

Court's decision is reported at 261 Ga. 124, ___ S.E.2d ___ (1991).

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(3) which authorizes the grant of the Writ of Certiorari to the highest court of a state in a case where a right, privilege or immunity is specifically claimed under the Constitution of the United States. The Georgia Supreme Court denied petitioner's timely Motion for Reconsideration on March 27, 1991. In accordance with Rule 13(1) & (4) of this court, this petition is filed within ninety (90) days of the entry of the Judgment of the Georgia Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Carrie Angela Lattarulo was convicted of Driving While Under the Influence of Alcohol in violation of Georgia's D.U.I. statute, O.C.G.A. §40-6-391. She appealed her conviction to the Georgia Court of Appeals which transferred the case to the Georgia Supreme Court due to the constitutional questions involved in the case.

At her trial petitioner moved to suppress the result of a test of her breath conducted on an Intoximeter 3000 breathalyzer machine alleging the same was not shown to be scientifically reliable or verifiably certain and challenged the constitutionality of Georgia's statutory scheme which permits the admission of the results with no such foundational showing on due process grounds. The test showed she had an "alcohol concentration" of .19 grams per cent.

Extensive expert testimony was presented by both sides prior to and during the trial which established considerable undisputed facts concerning the Intoximeter 3000. The state called Mr. James Panter, Supervisor, Implied Consent Section, Division of Forensic Sciences, Georgia Bureau of Investigation. The petitioner presented the testimony of Dr. James W. Woodford, a forensic chemist.

The machine has been the exclusive breath testing method used in the State of Georgia since 1987 having been first introduced in 1982. The machines have a component in them known as a "Taguchi Cell" which detects the presence of compounds similar to alcohol sometimes found on the human breath. There have been some 102 identified. With the Taguchi functioning the machine will

print out "interfering substances" when organic compounds other than alcohol are encountered to warn the operator there is a problem. Without the Taguchi functioning the machine will read these compounds as alcohol and add them into the results.

When the Intoximeter 3000 was first introduced in Georgia it had an operative Taguchi. However, several years after its introduction the Taguchi was disengaged at the direction of Mr. Panter. Thusly configured the Intoximeter 3000 does not read specific for alcohol.

The machine can also give false positive alcohol readings where the subject has been exposed to interfering substances in the environment. Some of these interfering substances have different evaporation rates than alcohol and for this reason can be overstated in the machine results by as much as 300 times what is actually present.

According to the state's expert, the Division of Forensic Sciences of the Georgia Bureau of Investigation, the state agency responsible for the approval and maintenance of the machines, has done no studies to determine the level of interfering contamination a person could get from the "atmosphere, or from exposure, or for whatever reason".

The Intoximeter 3000 assumes all test subjects have a 1 to 2100 ratio or that the "grams of alcohol in 210 liters (210,000 milliliters) of breath would be the same thing as the grams of alcohol in 100 milliliters of blood." A person with a lower ratio will register higher on the instrument that s/he will with a blood test. The petitioner, according to infrared measurement, has a much lower blood/air ratio than the average employed by the machine.

A subject's body temperature will affect the accuracy of the Intoximeter 3000. For each degree rise in body temperature over the average the machine will overstate the person's reading by seven percent.

The Division of Forensic Sciences developed a "checklist" for use in screening Intoximeter 3000 test subjects for the possible presence of interfering substances and other factors and conditions which could affect the accuracy of the test. As the state's expert noted: "The only way we know to find out if that's possible in this particular case is to ask the question". And without knowing all the circumstances it was "impossible, absolutely" to say the machine results were a measure of alcohol. The arresting officer who also ran the test admitted that although he was aware of the checklist he did not utilize it in petitioner's case. A copy of the checklist admitted at trial as a defense exhibit is appended.

Petitioner's motion to suppress the test results was denied by the trial court which made no finding as to their reliability.

In its charge to the jury the trial court told the jury "alcohol concentration under Georgia law means grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath". This charge was in fact a restatement of the definition of alcohol concentration contained in O.C.G.A. §40-1-1(1). Petitioner contended on appeal that this charge was burden shifting.

The Georgia Supreme Court affirmed the trial court's admission of the Intoximeter 3000 results, upheld the constitutionality of the statutory scheme and found no error in the judge's charge to the jury.

REASONS FOR GRANTING THE WRIT

Probably the most widely accepted standard for determining the admissibility of scientific evidence is set forth in the decision in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). There, in affirming the district court's refusal to admit the results of a systolic blood pressure deception test, the court stated:

> [T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.

Frye, 293 F. at 1014.

In *Harper v. State*, 249 Ga. 519, 292 S.E.2d 389 (1982), the Georgia Supreme Court affirmed the trial court's exclusion of a psychiatrist's testimony that the defendant while under the influence of sodium amytal or "truth serum" had denied committing the crime for which he was convicted. The court held:

> After much consideration, we conclude that the Frye rule of "counting heads" in the scientific community is not an appropriate way to determine the admissibility of a scientific procedure in evidence. Instead, we approve of the approach taken by the trial judge in this case. We hold that it is proper for the trial judge to decide whether the procedure of technique in question has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure "rests upon the

> laws of nature." The trial court may make this determination from evidence presented to it at trial by the parties; in this regard expert testimony may be of value. Or the trial court may base its determination on exhibits, treatises or the rationale of cases in other jurisdictions. . . . [W]e agree with the trial court that, until it is proven with verifiable certainty that truth serum compels a person to tell the truth, neither the results of truth-serum tests nor the opinions of experts based on the results of these tests shall be admissible in evidence.

Harper, 249 Ga. at 525-526.

In this case the trial court dispensing with the *Harper* requirement that the procedure's reliability must be shown, premised its admission of the state's test results on the provisions of O.C.G.A. §40-6-392. That section provides the results of a state administered test of the accused's blood, breath, urine or other bodily substance "shall be admissible" provided the test "shall have been performed according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation." O.C.G.A. §40-6-392(a)(1).

Similarly, the Georgia Supreme Court has abrogated that requirement. In *Brannan v. State*, 261 Ga. 128, ___ S.E.2d ___ (1991), the court granted certiorari to review the following question:

> Whether the admissibility of breathalyzer test results is controlled solely by O.C.G.A. §40-6-392, so that, as long as a test has been conducted in compliance with that statute, a defendant is precluded from attacking the admissibility of the test based on a challenge to the scientific reliability of the result?

Answering that question in the affirmative the court held:

> We find that the admissibility of breathalyzer test results is controlled solely by O.C.G.A. §40-6-392, and we affirm. . . . Mr. Brannan asserts that the trial court erred in denying his motion to suppress and his motion in limine. Central to Mr. Brannan's assertions are allegations that breathalyzer results are scientifically unreliable, and that the Intoximeter 3000, as currently used in Georgia, has not been properly approved under O.C.G.A. §40-6-392. These allegations are controlled by *Lattarulo v. State*, 261 Ga. 124 (___ S.E.2d ___) (1991), and we find no error in the denial of Mr. Brannan's motions.

Brannan, 261 Ga. at 128.

In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), this court held:

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. at 364, 90 S.Ct., at 1073. This "bedrock, 'axiomatic and elementary' [constitutional] principal," *id.*, at 363, 90 S.Ct., at 1072, prohibits the state from using evidentiary presumptions . . . that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis, 105 S.Ct. at 1970.

By virtue of the ruling in this case the state is in fact relieved of its burden of proof beyond a reasonable doubt. First, the state's evidence is presumed reliable and

admitted with no reliability foundational showing. Secondly, if the results show a reading of .10 or more "it shall be presumed that the person was under the influence of alcohol". O.C.G.A. §40-6-392(b)(3). Where the result is .12 or more "the person shall be in violation" of the D.U.I. statute. O.C.G.A. §40-6-392(b)(4). Unless an accused is fortunate enough to have the resources to employ an expert witness to attack the creditability of the evidence before the jury no possibility of prevailing exists. Even where, as here, it is shown without dispute that the results of the state's test are unreliable they are nonetheless admissible provided the state's procedures, such as they may be, have been followed.

While, as the Georgia Supreme Court properly noted, the principals of breath testing are indeed widely accepted, there was no showing that the specific breath testing procedure employed here, the Intoximeter 3000 with the Taguchi screening device disengaged and no other screening procedures employed, has been approved by the courts of any other jurisdiction. In fact, the use of breath testing devices modified with no notice to the public of the nature of the modification has been disapproved by other states. (Mr. Panter testified the administrative filings of his agency did not reflect the modification.) See *Florida v. Flood*, 523 So.2d 1180 (5th Dist. 1988); *Pennsylvania v. McGinnis*, 515 A.2d 347 (1986).

Moreover, other states have recognized the admissibility of breathalyzer results may be challenged where the accuracy of the testing is doubtful. In *Idaho v. Hartwig*, 732 P.2d 339 (Idaho App. 1987), a case cited by the Georgia Supreme Court, the court noted:

> Obviously, the reliability and performance of any given machine is subject to challenge. If there is evidence that any particular machine has malfunctioned or was designed or operated so as to produce unreliable results, such evidence would be relevant to both the admissibility and weight of the test results.

Hartwig, 732 P.2d at 344.

Similarly, the court in *Wisconsin v. Miles*, 349 N.W.2d 740 (Wis. App. 1984), observed:

> A situation may arise where the party objecting to the admissibility of the breathalyzer test convinces the court that the accuracy of the test is so questionable that its results are not probative and, therefore, not admissible as relevant evidence . . . Or the court may, in some cases, conclude that accuracy of the test is so questionable that its probative value is outweighed by its prejudicial effect.

Miles, 349 N.W.2d at 742.

The jury's probable belief in the accuracy of the state's test results by virtue of their admission into evidence by the trial judge was certainly buttressed by his charge to them on the statutory definition of "alcohol concentration". The charge in effect told them they must presume the standard blood-air ratio applied by the machine in its calculations was correct despite the undisputed expert testimony that the petitioner's personal ratio was significantly less and would cause the machine results to be overstated. This action in and of itself created an impermissible evidentiary presumption prohibited by this court's decision in *Francis*, supra, thereby rendering the trial violative of the due process guarantees

of the 14th Amendment. See also *Yates v. Evatt, et al.*, ___ U.S. ___, 59 U.S.L.W. 4509 (1991).

CONCLUSION

The Georgia legislature and the Georgia Supreme Court have literally given the state carte blanche to introduce into evidence its alcohol test results in D.U.I. prosecutions. There need be no showing that the test was done in a scientific manner or the results are accurate. Even where the results are shown to be unreliable they can go into evidence. Moreover, the jury is instructed it must presume the correctness of scientific assumptions employed in the state's calculations where there is no support for them in the evidence or even where, as here, they are disproven entirely.

Triers of fact tend to assign the level of infallibility to such "scientific" evidence. In this age of computers and complex technology, judges and juries take as gospel evidence which has this aura of mechanical precision about it. The phenomenon is well documented by prominent treatises. *See*, McCormick's Handbook on the Law of Evidence, 3rd Edition 1984, Sections 203 and 205.

There can be no question that the crime of driving under the influence of alcohol is serious. Persons convicted should be punished according to the law. However, a person accused of driving under the influence should not be subjected to perjured testimony being used

against him. The use of a result produced by an Intoximeter 3000, as configured and utilized in Georgia, to prosecute citizens accused of driving under the influence does nothing to further the cause of justice.

The accused is entitled, as a matter of due process, to the use of accurate scientific evidence when it is used against her. The important state policy of keeping drunk drivers off the streets must not be allowed to provide the expedient to denigrate the constitutional rights of the accused.

This court should grant certiorari to consider the compelling questions of constitutional import presented by this case.

Respectfully submitted,

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APPENDIX

In the Supreme Court of Georgia

Decided: FEB 28 1991

S91A0204. LATTARULO V. STATE.

CLARKE, Chief Justice.

This is an appeal from a conviction for driving under the influence of alcohol. Appellant raises several constitutional issues and other alleged errors in the trial of her case. We find no error and affirm the conviction.

Carrie Angela Lattarulo was stopped for speeding. When she emerged from her car, the arresting officer noticed that she was unsteady on her feet, that her speech was slurred, her breath smelled of alcohol, her clothing was disarranged, and her face was flushed. The officer also observed four or five empty beer bottles on the front floorboard of the car. A breathalyzer test given about an hour after she was stopped yielded a .19 blood/alcohol concentration result. Lattarulo was arrested and convicted of speeding and driving under the influence.

1. Lattarulo first contends that OCGA § 40-6-392(b)(3) creates an unconstitutional, burden-shifting presumption that a person with 0.10 grams of alcohol per liter of blood is "under the influence" of alcohol.

In *Lester v. State*, 253 Ga. 235 (320 SE2d 142) (1984), we upheld the constitutionality of OCGA § 40-6-391(a)(4) which criminalizes the act of "driving while having a blood-alcohol count of at least .12%." *Id.* at 237. We explained that by so defining the criminal act, the legislature had made irrelevant the driving ability of any

individual with that blood-alcohol ratio. We said, "[t]he statute represents the judgment that the public interest will be best served if no one with such a high blood-alcohol count drives." *Id.* at n. 5. We held that the statute did not create an unconstitutional presumption of guilt because (1) the state is still required to prove beyond a reasonable doubt that the defendant committed the act of driving while having a blood-alcohol level of .12 or higher; and, (2) any defendant may challenge either the evidence that he had that blood-alcohol level or that he was driving. *Id.*

We now hold that the provision challenged here, although it is worded in terms of a presumption, actually has the effect of defining the level of blood-alcohol that is sufficient to permit an inference that the driver is "under the influence." It does not create a burden-shifting presumption of guilt. OCGA § 40-6-392(b)(3) must be read in conjunction with OCGA §§ 40-6-391(a)(1)-(3) which makes it a crime to drive while "under the influence" of alcohol, a drug or a combination of alcohol and a drug "to the extent that it is less safe for the person to drive." OCGA §§ 40-6-392(b)(1)-(3) then define at what level of blood-alcohol a person is "under the influence" within the meaning of OCGA §§ 40-6-391(a)(1)-(3). OCGA §§ 40-6-392(b)(1)-(3) represent the legislative determination that the public interest is best served if people with a blood-alcohol level of less than .05 grams or less are permitted to drive; while people with a blood-alcohol concentration between .05 and .099 may drive only if they can do so safely; and people with a blood-alcohol concentration above .10 grams per liter should not drive at all. This determination is within the legislature's authority under the Twenty-First Amendment and the police power

and is the type of determination that is particularly well-suited to the legislative process.

The challenged provisions do not relieve the state of its burden of proving that the accused had was [sic] "under the influence" and was driving. They do not prevent the accused from introducing any evidence to demonstrate that the blood-alcohol test was inaccurate or that he did not commit the offense. Further, precedents of the Court of Appeals have established that the statute may not be charged to the jury using the word "presumption." *Simon v. State*, 182 Ga. App. 210 (355 SE2d 120) (1987); *Peters v. State*, 175 Ga. App. 463 (333 SE2d 436) (1985). Under these precedents, the jury may not be instructed that the blood-alcohol level creates a presumption of guilt. *Id.* Therefore, we conclude that the challenged provisions do not create an unconstitutional presumption.

2. Lattarulo next argues that the statutory scheme is unconstitutional because it does not apprise her of the "nature and cause of the accusation against her" in violation of the due process and equal protection clauses of the U.S. Constitution. We find no merit in these arguments. The statute as recently amended is no more vague or indefinite than it was when we held that it passed constitutional muster in *Cook v. State*, 220 Ga. 463, (139 SE2d 383) (1964) and in *Cargile v. State*, 244 Ga. 871 (1979). Indeed, the present statute is even more definite than its predecessors. We find no constitutional infirmity.

3. Lattarulo next asserts that the results of a breathalyzer test carried out on an Intoximeter 3000 machine should be excluded from evidence because they have not been shown to be scientifically reliable.

In *Harper v. State*, 249 Ga. 519, 525 (292 SE2d 389) (1982), we held that the test for admissibility of novel scientific evidence is whether the procedure or technique "has reached a scientific stage of verifiable certainty, or in the words of Professor Irving Younger, whether the procedure 'rests on the laws of nature.' " We went on to say that "[o]nce a procedure has been recognized in a substantial number of courts, a trial judge may judicially notice, without receiving evidence, that the procedure has been established with verifiable certainty, or that as widespread as radar or fingerprints. *See*, e.g., *State v. Hartwig*, 732 P.2d 339 (Idaho App. 1987) (; [sic] *State v. Miles*, 349 N.W.2d 740 (Wis. App. 1984); *Hamann v. State*, 565 A.2d 924 (Del. 1989); *State v. Jordan*, 575 A.2d 309 (Me. 1990); *Layton City v. Watson*, 733 P.2d 499 (Utah, 1987) (There is universal acceptance of the reliability of breathalyzer evidence.) The Intoximeter 3000, the type of breathalyzer machine used in this case, is used, at a minimum, in Alaska, Florida, Georgia, Idaho, New Hampshire, New York, Tennessee, Wisconsin, Wyoming, and country-wide in England. Its characteristics, theory, operation, and scientific acceptability have been discussed in numerous judicial opinions. *See particularly People v. Jones*, 118 Misc.2d 687, 461 N.Y.S.2d 962 (Co. Ct. 1983).

Further, the expert testimony introduced by Lattarulo does not indicate that the Intoximeter 3000 test is not based on sound scientific theory, rather it indicates only that the test has some margin for error or may give an erroneous result under certain circumstances. As we noted above, no procedure is infallible. An accused may always introduce evidence of the possibility of error or circumstances that might have caused the machine to

malfunction. Such evidence would relate to the weight rather than the admissibility of breathalyzer results. Moreover, the legislature has by statute created procedural safeguards to minimize the possibility of erroneous test results. Under OCGA § 40-6-392(a)(1), breathalyzer tests may only be administered according to methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation and by an [sic] a person who has a valid permit to administer the test. The arresting officer is also required by statute to inform the accused of his/her right to have a blood test administered by a qualified person of his/her own choice. OCGA §§ 40-6-392(a)(3) and (4).

In sum, we hold that trial courts may take judicial notice that the Intoximeter 3000 machine test results are based on accepted scientific theory or "rest upon the laws of nature;" and, when the statutory requirements for admissibility are met, the results may be admitted into evidence without expert testimony regarding the scientific theory behind the operation of the test.

4. Appellant next argues that the results of the breath test should have been excluded because it was not conducted in accordance with methods properly approved by the Division of Forensic Sciences. Appellant argues that the Intoximeter 3000 has not been properly approved because the Division of Forensic Sciences did not comply with the Administrative Procedure Act in approving the currently used version of the Intoximeter 3000 as modified by the disengagement of the "Taguchi cell," a device that measures acetone and other substances that might interfere with the test result. This argument is without merit.

The record demonstrates that in 1984 it was determined within the Department of Forensic Sciences that the Taguchi cell affected only aberrant cases and was not worth the time and effort necessary to calibrate it. The machines currently used are not modified "by the trooper in the field," as appellant charges. Since 1984, the Intoximeter 3000 machines have been ordered and shipped from the factory with the Taguchi cell device turned off. The machines are received approved, set up and delivered to the local police departments by the Department of Forensic Sciences. They are maintained and calibrated by the Department of Forensic Sciences. Finally, the use of the Intoximeter 3000 was approved in accordance with the Administrative Procedures Act in 1986. At that time, the Division of Forensic Sciences had not used a Taguchi cell for two years. We therefore conclude that the Intoximeter 3000 was approved in accordance with the statutory requirements.

3. Lattarulo next argues that the trial court erred in failing to quash the speeding citation and the driving under the influence accusation. We have reviewed the record and conclude that the forms used were in substantial compliance with the rules of the Department of Public Safety and state statutes. Any deficiency in the accusation or citation was purely technical and did not work to deprive the appellant of any significant right. We find no error in the trial court's denial of the motions to quash.

4. We have reviewed Lattarulo's claims that the trial court erred in charging the jury with the language of OCGA § 40-1-1(1) regarding "alcohol concentration" and find it to be without merit.

5. Finally, Lattarulo contends that the court should have granted a directed verdict in her favor. We disagree. The evidence adduced at trial was certainly sufficient to support a verdict of guilty beyond a reasonable doubt on each offense charged. *Jackson v. Virginia*, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979).

Judgment affirmed. All the Justices concur.

SUPREME COURT OF GEORGIA

ATLANTA MARCH 27, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Case No. S91A0204

CARRIE A. LATTARULO V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

Joline B. Williams, Clerk

S91A0204

SUPREME COURT OF GEORGIA

ATLANTA APRIL 15, 1991

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BY: Clarke, C.J.

The following direction was given:

CARRIE A. LATTARULO V. THE STATE

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on March 27, 1991, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, provided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme

Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

Chief Justice Harold G. Clarke

INTOXIMETER 3000

SUBJECT TEST CHECKLIST

The following questions are recommended to assist intoximeter operators in screening subjects for breath alcohol tests.

1.	Has subject been under observation for 20 minutes? *If NO, then wait 20 min.*	YES NO
2.	Does subject have dentures or other partial dental plates? *If YES, have subject remove and rinse mouth with water.*	YES NO
3.	Is subject on any medication?	YES NO
4.	Is subject under a doctor's care or under treatment for diabetes or weight reduction?	YES NO
5.	Is subject on a high protein, low carbohydrate diet or fasting?	YES NO
6.	Has subject been exposed to any paint or glue fumes or other chemical solvents in last 6 hours?	YES NO

7.	Does subject have any smokeless tobacco (i.e., chewing tobacco or snuff) in mouth? *If YES, have subject remove and rinse mouth with water.*	YES	NO
8.	Does subject smoke?	YES	NO
	Has subject smoked in last 20 minutes?	YES	NO

(Defendant's Trial Exhibit 1)

Supreme Court, U.S.
FILED
AUG 5 1991
OFFICE OF THE CLERK

(2)

No. 90-1975

In The

Supreme Court of the United States

October Term, 1991

CARRIE ANGELA LATTARULO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Did the Georgia Supreme Court properly apply state law to determine whether the results of a test of Petitioner's breath were admissible in evidence in a prosecution of Petitioner for driving under the influence of alcohol or drugs?

II.

Is the statutory definition of the term "alcohol concentration" an evidentiary presumption?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

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No. 90-1975

In The

Supreme Court of the United States

October Term, 1991

CARRIE ANGELA LATTARULO,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S RESPONSE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Comes now the STATE OF GEORGIA, Respondent in the above-styled action, by counsel, Michael J. Bowers, Attorney General for the State of Georgia, and prays that this Court deny the Petition for Writ of Certiorari to the Supreme Court of Georgia.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia of which review is sought is reported at 261 Ga. 124 (1991).

The opinion is attached to Petitioner's Petition for a Writ of Certiorari as an appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3), which was repealed in 1988. Pub. L. 100-352, § 3. It appears that jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a), granting this Court jurisdiction to consider, by writ of certiorari, the validity of a state statute drawn in question on the ground of its being repugnant to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

Set forth in the Petition for Writ of Certiorari is U.S. Const. Amend. XIV, § I.

STATEMENT OF THE CASE

As set forth in the opinion of the Supreme Court of Georgia, a police officer stopped Petitioner after determining that she had been speeding. When Petitioner got out of her car, the officer noticed that she was unsteady on her feet, that her speech was slurred, that her breath smelled of alcohol, that her clothing was in disarray, and that her face was flushed. He observed four or five empty beer bottles on the front floorboard of her car. The officer

arrested Petitioner and charged her with speeding and driving under the influence.

Subsequent to the arrest, Petitioner was given a chemical test of her breath to measure the amount of alcohol in her system. That test disclosed that Petitioner's breath contained an alcohol concentration of 0.19 grams per 210 liters of breath.

Petitioner was tried in the State Court of Houston County (under Georgia law, state courts are granted jurisdiction over, *inter alia*, the prosecution of misdemeanor criminal charges). At the conclusion of trial, Petitioner was convicted of the driving under the influence and speeding charges.

Petitioner appealed her convictions to the Georgia Court of Appeals. In accordance with Georgia's allocation of jurisdiction between its appellate courts, the Court of Appeals transferred the appeal to the Georgia Supreme Court, which considered the appeal and issued an opinion affirming the convictions on February 28, 1991. The Supreme Court denied a Motion for Reconsideration on March 27, 1991.

REASONS WHY THE WRIT SHOULD BE DENIED

A. THE GEORGIA SUPREME COURT PROPERLY APPLIED STATE LAW IN CONCLUDING THAT SCIENTIFIC EVIDENCE OF PETITIONER'S ALCOHOL CONCENTRATION WAS ADMISSIBLE, AND THAT DETERMINATION PRESENTS NO FEDERAL QUESTION FOR REVIEW.

In the Petition, Petitioner initially challenges the determination of the Supreme Court of Georgia that

scientific evidence of Petitioner's alcohol concentration was admissible. The court's determination was based upon the provisions of O.C.G.A. § 40-6-392(a)(1), which provides that the results of a state-administered chemical test of blood, breath, urine, or other bodily substances "shall be admissible" if the test is performed in accordance with methods approved by the Division of Forensic Sciences of the Georgia Bureau of Investigation. The court concluded that, as a matter of state law, the methods utilized in obtaining a chemical test of Petitioner's breath in the case at bar had been performed according to methods approved by the Division of Forensic Sciences. The court then concluded that, pursuant to the state statute, the results were admissible. Appendix, at 5. *See also Brannan v. State,* 261 Ga. 128 (1991), wherein the court held that the admissibility of such test results "is controlled solely by O.C.G.A. § 40-6-392. . . . " *Id.*

Petitioner claims that the due process clause of the United States Constitution is violated by the decision of the George Supreme Court to allow the admission of scientific evidence without proof of its reliability and scientific acceptance. In essence, Petitioner asserts that the decision of the District of Columbia Circuit Court of Appeals in *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) establishes a rule of constitutional dimension regulating the admissibility of scientific evidence. However, this is simply not the case. The *Frye* test is simply an application of common law principles in a federal criminal case to determine whether certain evidence is admissible.

Although many states have adopted that test, it is not the law in Georgia. *Caldwell v. State,* 260 Ga. 278, 285, 393

S.E.2d 436 (1990); *Harper v. State*, 249 Ga. 519, 525, 292 S.E.2d 389 (1982). Questions surrounding the admissibility of scientific evidence are a matter of criminal procedure determined by the laws of the various jurisdictions, rather than a matter of federal constitutional law. Indeed, *Frye* is not even universally applied by the federal circuit courts of appeals. *See, e.g., United States v. Downing*, 753 F.2d 1224, 1232-33 (3rd Cir. 1985); Giannelli, "The Admissibility of Novel Scientific Evidence: *Frye v. United States*, A Half-Century Later," 80 Colum. L. Rev. 1197, 1201-02 (1980).

Some commentators have taken the position that *Frye* has been abandoned subsequent to the adoption of the Federal Rules of Evidence. *See, e.g.*, 3 J. Weinstein & N. Berger, Weinstein's Evidence, § 702[03] at 702-16; 22 C. Wright & K. Graham, Federal Practice & Procedure § 5168, at 86-90 (1978). Thus, the *Frye* test is not even a universally followed principle of common law, much less a constitutional requirement.

Moreover, careful reading of Petitioner's contentions discloses that they are misplaced. Petitioner's argument is premised upon her contention that non-compliance with the *Frye* test results in a due process violation by permitting use of an evidentiary presumption relieving the State of its burden of proof, relying upon *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985).

However, *Francis* is inapplicable for a very simple reason: *Francis* prohibits the use of an evidentiary presumption that has "the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every

essential element of a crime." Francis, at 313 (emphasis added). Omitted from the quoted language in the Petition is the fact that *Francis* is limited in its application to charges to the jury. More important, however, the prohibition against evidentiary presumptions prohibits the state from using such a presumption to avoid its burden of proof as to an essential element of a crime. Of course, satisfaction of the *Frye* test prior to admission of scientific evidence is not an essential element of the crime of driving under the influence defined by Georgia law. As noted by the Georgia Supreme Court, although O.C.G.A. § 40-6-391(a)(4) is worded so that at first blush it appears to create a presumption, it in fact does not do so. Appendix, at 2. Rather, O.C.G.A. § 40-6-391(a)(4) prohibits (a) the operation of a motor vehicle in the State of Georgia while (b) having an alcohol concentration of .12 grams or higher. Thus, the statutory provision for admissibility is not a prohibited evidentiary presumption.

Finally, the state court concluded, notwithstanding the statutory provision, that the scientific evidence in question tendered by the State was in fact based upon accepted scientific theory or rested upon the laws of nature and therefore was admissible upon compliance with the statutory requirements. Appendix, p. 5. The court found that, independent of the statutory requirements, the proffered evidence satisfied Georgia's common law rule of evidence for the admissibility of scientific evidence. Respondent submits, therefore, that the admission of the results of a scientific test of Petitioner's breath to determine its alcoholic content did not deprive Petitioner of due process of law.

B. THE CHARGE TO THE JURY WAS NOT VIOLATIVE OF DUE PROCESS.

Petitioner's argument in support of the second question which she presents is confined to a single paragraph in the Petition. In vague and conclusory fashion, Petitioner alleges that the court's charge as to the statutory definition of the term "alcohol concentration" required the jurors to presume certain facts, violating the court's decision in *Francis*. However, the trial court's charge is not set forth anywhere in the Petition or in the Appendix, nor does Petitioner demonstrate that the charge was objected to on this ground below in order to preserve this alleged error for review. Respondent contends that in the absence of such a showing, there is simply nothing for this Court to consider, and that this ground presents no basis for the grant of certiorari.

Under Georgia law, the term "alcohol concentration" is defined as the grams of alcohol per 100 milliliters of blood or per 210 liters of breath. O.C.G.A. § 40-1-1(1). The State was required to adopt a standardized definition by the federal government. Uniform Standards for State Highway Safety Programs, 23 C.F.R. § 1204.4, p. 486. Nothing in this statute creates a presumption of any sort, and in the absence of the verbatim charge given by the trial court in the Appendix, as well as any objections lodged thereto by Petitioner, Respondent contends that the Court should deny the Petition as to this ground.

CONCLUSION

O.C.G.A. § 40-6-392(a)(1), which prescribes the conditions under which the results of scientific tests of a defendant's blood, breath, urine, or other bodily substance may be admitted in evidence in the State of Georgia, does not deprive criminal defendants of due process of law. The Georgia Supreme Court properly applied the State's rules of evidence in concluding that this evidence was admissible. The conclusion that evidence is admissible is not an evidentiary presumption which excuses the State from proof of any essential element of the crime charged. The Petition contains an inadequate basis for the Court to consider Petitioner's claims that the trial court's charge to the jury was deficient. Respondent therefore respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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